REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 27 OF 2014

Appeal from the original conviction and sentence by the Acting Senior Resident Magistrate at Mwingi (V.A. Otieno) in Criminal Case No.124 of 2013

SIMON KANUI MWENDWA……APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

JUDGEMENT

Simon Kanui Mwendwa, whom we will call the appellant in this judgement, was convicted and sentenced to death for the offence of robbery with violence contrary to section 296 (2) of the Penal Code. It was alleged in the particulars of the offence that on 18th March 2013 at Mutwang'ombe Market, Endui location in Mwingi Central District within Kitui County, jointly with another not before the court, robbed Addan Mohamed Ali of his mobile phone make Nokia C2 serial number 35169205986285 valued at Kshs 8,400 and cash Kshs 16,200 all valued at Kshs 24,600 and immediately before the time of such robbery threatened to use actual violence to the said Adan Mohamed Ali.

The appellant faced an alternative count of handling stolen property contrary to section 322 (1) of the Penal Code. It was alleged that at the same date and place as in the main charge he dishonestly retained one mobile phone battery make discovery otherwise than in the cause of stealing knowing or having reason to believe it to be stolen property.

The case for the prosecution was supported by evidence of four witnesses while the appellant and one witness testified for the defence. According to the prosecution evidence, Adan Mohamed Ali, PW1, was travelling to Mombasa through Nairobi on Garissa Nairobi road on 18th March 2013. He was driving a lorry registration number KBE 166P. On reaching Mutwang'ombe market along this road his lorry developed mechanical problems and he stopped the lorry at Mutwang'ombe market and alighted to look for M-Pesa agent. He was confronted by a hostile crowd. One person in the crowd asked him what he, a Somali, was doing in Ukambani. PW1 explained to the crowd that his vehicle had developed problems but the crowd got agitated. One person, identified by PW1 as the appellant, started chasing him with the crowd shouting that he was a member of the Al shabaab. PW1 fled for safety but the appellant grabbed him and in company of another person led him towards a thicket. They ransacked him and removed money from his pocket and socks. They also took his wallet and mobile phone. At the same time they were using kicks on him.

PW1 was assisted to the chief's office where he reported the matter. Following that report, the appellant was arrested at night on the same day and the phone and battery recovered. His accomplice escaped.

In his defence given under oath, the appellant denied robbing PW1. He told the court that he operates a *boda boda* at a kiosk. While at his station he noticed a commotion and he went to find out what it was all about. He said the charges are false. His witness, Kilonzo Mwende testified that he noticed a commotion and was surprised to learn later that the appellant was arrested.

The appellant had filed two sets of petitions of appeal and sought leave to file an amended petition of appeal. He asked the court to expunge from the record the memorandum of appeal dated on 29th April 2014 and filed on 5th May 2014. He told the court that he would rely on the petition of appeal filed on 21st May 2014 and the amended petition of appeal filed together with written submissions on 14th July 2014.

In the petition of appeal filed on 21st May 2014 the appellant has stated that:

i. The prosecution evidence was contradictory.
ii. Crucial witnesses were not summoned to testify.
iii. The P3 Form was not produced as an exhibit to support the alleged robbery.
iv. There was no eye witness who testified.
v. None of the complainant's items was recovered from him.
vi. The sentence is harsh and excessive despite the appellant was a first offender.
vii. The appellant's defence was not considered.

In his amended petition of appeal, the appellant has stated that the trial court relied on evidence of a single identifying witness; that the prosecution evidence was insufficient, unbelievable and incredible; that the prosecution did not prove the case beyond reasonable doubt and that the trial court did not comply with sections 169 and 211 of the Criminal Procedure Code. Grounds five and six relate to failure to summon some witnesses and to take into account the appellant's defence.

In his submissions, the appellant stated that the trial court did not consider his defence; that the trial court failed to give reasons for the decision arrived at in accordance with section 169 of the Criminal Procedure Code; that the complainant was new in the market and therefore he could not have known the appellant; that there are contradictions on the manner the battery was recovered creating doubts as to whether the exhibit was found with the appellant; that the evidence did not meet the threshold of the principle of recent possession and that section 211 of the Criminal Procedure Code was not complied with.

The appeal was opposed by the respondent. Learned state counsel submitted that the trial court considered the defence and found it to be a mere denial; that the appellant's defence and evidence of his witness puts him at the scene of the crime; that the battery recovered from the appellant was positively identified by the complainant and that recovery of the sim card was within 24 hours after the robbery and the sim card was found inside the appellant's own mobile phone; that the appellant did not state which other witnesses did not testify and that by dint of section 143 of the Evidence Act no particular number of witnesses is required to prove a case; that the appellant was positively identified by the complainant; that this is a proper case to apply the doctrine of recent possession; that the production of the P3 Form is not necessary and the prosecution need only to prove one ingredient of robbery with violence.

Learned state counsel further submitted that the contradictions, if any, do not go the root of the case; that section 211 of the Criminal Procedure Code must have been explained orally to the appellant because he chose to testify under oath and brought one witness and that there was no failure of justice; that the prosecution case has been proved beyond reasonable doubt and that the sentence imposed is a legal sentence.

Determination

It is required of this court while sitting on first appeal to critically examine, analyze and evaluate all the evidence tendered in the lower court afresh. In so doing, this court is expected either to agree with the trial court in its findings or to arrive at its own different independent conclusion. We are alive to this requirement. We however caution ourselves that we did not observe the witnesses during the trial and

give allowance to that.

We have understood the appellant to be raising the following issues:

i. That, the evidence in support of the prosecution case is insufficient and contradictory.
ii. That, crucial witnesses did not testify.
iii. That, he was not positively identified.
iv. That, his defence was not considered.
v. That, sections 169 and 211 Criminal Procedure Code were not complied with.
vi. That, the sentence is harsh and excessive.

From the outset we find the claim that the trial court did not consider the appellant's defence without merit. We have noted that the trial court analyzed the defence and summarized that the defence amounted to a simple denial and that he did not account for the possession of the battery recovered from him. We also find that the trial court gave reasons in the judgement as to the conclusions that court made thereby complying with section 169 of the Criminal Procedure Code.

In regard to whether section 211 of the Criminal Procedure Code was complied with, we have noted that after the prosecution closed its case the trial made a ruling that a prima facie case sufficient to have the accused placed on his defence had been made. The court did not record as to whether section 211 Criminal Procedure Code had been complied with. We have however noted that the appellant told the court that he would give sworn evidence and call one witness. To our minds therefore the requirements of section 211 CPC were understood by the appellant. It may be that the court verbally explained the requirements of this section and failed to record the same. We have however found that there is no record that the prosecution cross examined the appellant after his testimony.

We will combine the issues of insufficient evidence, positive identification and crucial witnesses and consider them together.

The time of the robbery was 9.00am. PW1 in his evidence in cross examination testified that he did not know the appellant previously. PW1 is the only witness to testify on the appellant as one of the people who attacked and robbed his of the phone. PW2 the Assistant Chief did not explain how he knew it was the appellant who had attacked and robbed PW1. He testified to receiving a report of robbery and that the appellant and another were the suspects. PW2 did not expound how he knew it was the appellant. PW3 received the report of robbery and took part in looking for the appellant. He did not explain how he knew who to look for but said that the appellant was arrested that night at 9.00pm. In cross examination PW3 told the court that he recovered a phone and battery from the appellant. PW4 learned of the robbery much later and received recovered exhibits.

From the evidence of PW1, PW2 and PW3, it is clear that the evidence on the identification of the appellant is not clear. Specifically, there is no evidence as to who gave PW2 and PW3 the name of the suspect to enable them look for and arrest him given that PW1 did not know him before. However, that notwithstanding, the case does not rely purely on the identification of the appellant. There is evidence that after he was arrested, he was found in possession of a battery which was identified by PW1 as his by the identification mark he had placed on it.

It is true as claimed by the appellant that there are contradictions in evidence as to the number of phones recovered from the appellant. PW1 said he lost a phone and cash Kshs 16,000 but PW2 said two phones were stolen. PW3 testified that the police did not recovery anything from the second suspect who was not arrested. In our view these contradictions do not go to the root of the case given that there is evidence establishing that the appellant was arrested the same day in the evening and found in possession of a phone battery belonging to PW1. He had inserted it in his phone. This battery was positively identified by PW1 by a mark "A" he had inscribed on the battery. In our considered view, the recovery of the battery inside the appellant's phone establishes that the principles of recent possession as laid down in **Erick Otieno Arum v Republic [2006] eKLR** were satisfied. In that case the court of appeal pronounced itself as follows:

"In our view, before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect, secondly that; that property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other."

In the case of **George Otieno Dida & another v Republic [2011] eKLR**, the appellants were found in possession of the stolen property about four (5) hours after the robbery. There was no identification by the complainant of his assailants. The Court of Appeal upheld the conviction based on recent possession on grounds that it was founded on sound legal principles.

In this case we have found that the recovered battery found in possession of the appellant was positively identified by PW1 as belonging to him by the mark "A" he had placed on it; the appellant was found in possession of the same that evening of the robbery and he did not offer any explanation how he happened to have a battery belonging to the complainant in his phone. The battery had been stolen from the complainant that morning of 18th March 2013.

We have considered the submission that no P3 Form was tendered in evidence to support the charge of robbery with violence. This may not be necessary. The offence of robbery with violence is committed in any of the following circumstances:

i. **If the offender is armed with any dangerous or offensive weapon or instrument, or**
ii. **is in company with one or more other person or persons, or**
iii. **if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person.**

It is clear from the evidence that the appellant was in company of another who is at large. Although the complainant said he was severely beaten there is no evidence to support that. We however have no doubts in our mind that the appellant was in company with one other person. Although a crowd of people confronted the complainant in a hostile manner it is the appellant and another at large who robbed the complainant. We are alive to the fact that this bit of evidence is the evidence of a single witness, the complainant. We have cautioned ourselves of the dangers involved but are also aware that the appellant was found in possession of the phone battery the same evening. We have no doubt in our mind that he was not an innocent receiver of that battery but must have taken part in the robbery.

The appellant did not clarify which crucial witnesses were left out by the prosecution. We have considered that the prosecution summoned the number of witnesses it felt were crucial to their case and failure to summon many people to testify does not prejudice the appellant in any way.

Our conclusion is that the appeal has no merit. We however fault the trial magistrate in finding that the complainant identified the appellant as the suspect. Evidence on identification is shaky because of the omission to clearly explain the sequence of events leading to how the appellant was identified. We also note that the trial magistrate did not invoke the doctrine of recent possession which is the relevant doctrine to apply here but instead relied on identification of the appellant which is not safe for the reasons we have given. All in all, the evidence adduced is sufficient to base a conviction on.

In regard to the sentence, we have noted that the prosecutor did not present any previous records of the appellant. He is therefore to be treated as a first offender. Despite this there is only one sentence prescribed by law where an offender is found guilty under section 296(2) of the Penal Code. We therefore find that the sentence passed by the lower court is legal.

Consequently, we dismiss the appeal and uphold the conviction and sentence. It is so ordered.

Dated and signed this 11th September 2014.

F.N. MUCHEMI **S. N. MUTUKU**

JUDGE **JUDGE**

Delivered this 18th day of September 2014

By: Justice Stella Mutuku

JUDGE